Supreme Court, U. S.
FILED
NOV 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-461

WATERBURY URBAN RENEWAL AGENCY,

Petitioner,

v.

WATERBURY ACTION TO CONSERVE OUR HERITAGE, INCORPORATED

Respondent

ON PETITION FOR A WRIT ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM HOWARD
83 Crescent Street
Middletown, Connecticut 06457
Counsel for Respondent

Table of Contents

	Page
Table of Authorities	ii
Question Presented	1
Statute Involved	2
Statement of the Case	2
Reasons Why the Writ Should Be Denied	7
I. No true conflict exists between the decision of the second Circuit in this matter and other Courts of Appeal.	7
II. This petition for certiorari does not raise questions of Federal law so substantial as to require review by the United States Supreme Court.	11
III. Granting of the petition for certiorari and decision in favor of Petitioner on the issue raised would not provide Petitioner with any relief.	12
Conclusion	13
Addendum	14

Table of Authorities

Cases: PAGE

Committee to Save the South Green v. *Hills,* No. H-76-328 (D. Conn. Nov. 5, 1976), 7ELR 20061. 8

Goldlwar, Inc. v. *Heiman*, 369 U.S. 463, 8 L.Ed.2d 39, 83 S. Ct. 913 (1962) 12

Hart v. *Denver Urban Renewal Authority*, 551 F.2d 1178 (10th Cir. 1977) 8, 10

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324, 52 L.Ed. 2d 396, 95 S. Ct. 1843 (1977) 12

Kent County Council for Historic Preservation v. *Romney*, 304 F. Supp. 885 (W.D. Mich. 1969) ..8, 9, 10

Mandel v. *Bradley*, 432 U.S. 173, 53 L.Ed. 2d 199, 97 S.Ct. 2238 (1977)..... 10

St. Joseph Historical Society v. *Land Clearance for Redevelopment Authority*, 366 F. Supp. 605 (W.D. Mo. 1973)..... 8

Save the Courthouse Committee v. *Lynn*, 402 F. Supp. 1323 (S.D. N.Y. 1975)..... 8, 11

South Hill Neighborhood Association v. *Romney*, 421 F.2d 454 (6th Cir. 1969) 8, 9

Waterbury Action to Conserve Our Heritage v. *Harris, et als*, 603 F.2d 310 1,10,11

Statutes:

16 U.S.C. § 470f 2, 7

16 U.S.C. § 470s 10

42 U.S.C. § 5301 11

42 U.S.C. § 4331(b) (4) 12

Other Authorities:

36 C.F.R. Part 800 10

36 C.F.R. § 800.9 12

Rule 23(c), Supreme Court Rules..... 12

Rule 40(d) (c), Supreme Court Rules 12

20 Am. Jur 2d, Courts § 189..... 10

1B Moore's Federal Practice, £ 0.402 [2] (1978-79 Supp. at p. 13-14) 10

Anno., 45 L.Ed. 2d 791, ¶ 5 (1976) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-461

WATERBURY URBAN RENEWAL AGENCY,

Petitioner,

v.

WATERBURY ACTION TO CONSERVE OUR HERITAGE, INCORPORATED

Respondent

ON PETITION FOR A WRIT ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondent, Waterbury Action to Conserve Our Heritage, Incorporated ("WATCH"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion in this case. That opinion is reported at 603 F.2d 310.

Question Presented

Petitioner does not accurately set forth the question presented. The actual question presented is:

Whether the U.S. Department of Housing and Urban Development must continue to comply with the National Historic Preservation Act where it has retained significant control to make additional approvals with respect to a federally sponsored urban renewal project.

Statute Involved

The petition involves Section 106 of the National Historic Preservation Act ("NHPA") as amended in 1976, P.L. 94-422, Title II, § 201 (3), 90 Stat. 1320, which provides as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Sections 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking.

STATEMENT OF THE CASE

The Respondent is in general agreement with Petitioner's statement of the case. However, the following should be added for completeness.

Section II of the Loan and Capital Grant Contract mandates that the Urban Renewal Project not include any undertaking unless previously approved by the Secretary of HUD as "being in conformity with the approved application for the federal financial aid . . . . the Urban Renewal Plan, the applicable provisions of Title I [of the Housing Act], and the applicable provisions of this Contract." The contract lists as permissible undertakings:

> "(b) Demolition and removal by the Local Public Agency of buildings and improvements on Project Land; . . .
> (j) Relocating within or outside the project area of structures which will be restored and maintained for architectural or historic purposes; and
> (k) Restoration of acquired properties of historic or architectural value."

Under Sec. 108(A) of the Contract the Agency is required to promptly submit to HUD all data covering any proposed action of the Agency pertaining to the project. The acquisition of properties, the demolition of buildings and the approval of redevelopment projects and developers all require HUD's permission. This permission is necessary under Sec. 108(B) of the Contract to insure that the "Agency shall not take any step which might in the opinion of the Secretary [of HUD], violate applicable Federal laws or regulations."

The Agency has spent only $12,000,000 of the total cost of the project. None of the real estate represented by the remaining buildings scheduled for demolition has been disposed of by the Agency, or is under an agreement requiring conveyance. Any sale or disposition of the property represented by the buildings scheduled for demolition will require the approval of HUD. A substantial number of the remaining buildings scheduled for demolition are occupied by tenants of the Agency. The buildings scheduled for demolition were acquired between five and three years ago.

The buildings in the Project Area are of a classic turn-of-the-century main street type. The architecture of the area represents a collection of types such as Renaissance revival, Richardsonian romanesque, Greek revival, and Italianate. The area is an extremely good example of the period of its construction because such period was very ecclectic. The variety of styles, in addition to reflecting the architectural electicism of the time and place, reflects the variety of uses

dominate in the area during the period of construction and thus reflects the history, particularly the commercial history of Waterbury. The Project Area shows an evolution of uses and architectural styles having a significant effect on the development of the local culture.

On January 5, 1977, the Agency completed and forwarded to HUD's area office in Hartford, Connecticut, HUD Form ECO-1, Applicant's Environmental Information with respect to the Project Area. In the ECO-1, the Agency determined that "There are no known significant historic, archeological or architectural sites or properties listed on, or being considered for nomination to, the National Register of Historic Places." No further consideration of historical or architectural matters was made in the ECO-1. On January 21, 1977, HUD completed a Special Environmental Clearance for the R-107 Project, in which it was observed that "there are no properties listed or nominated to the National Register of Historical Places." No further consideration of historical or architectural matters was made in the Special Environmental Clearance. On January 25, 1977, HUD made a finding of inapplicability, stating there was no significant environmental impact with respect to the R-107 Project, and determined that the processing of the Project could proceed. The Environmental Clearance Officer in the HUD Area Office made no determination as to whether any structures in the Project Area were eligible for inclusion in the National Register of Historic Places. Prior to preparing the Special Environmental Clearance, the HUD Environmental Clearance Officer did not consult with the State Historic Preservation Officer ("SHPO") to determine if there were buildings or areas within the Project Area which might be eligible for inclusion in the National Register.

The ECO-1 did not consider alternatives to demolition of buildings designated for demolition in the Project Area. The special Environmental Clearance did not consider alternatives to demolition of buildings designated for demolition in the Project Area. HUD did not prepare an Environmental Impact Statement for the Project Area and did not consult with the National Advisory Council on Historic Preservation with respect to the Project Area.

The H. H. Peck Carriage House (Carriage House) is located in the Project Area. In a letter dated December 1, 1976, the Waterbury Commission on Aging suggested to SHPO that the Carriage House be considered for listing on the National Register. On March 3, 1977, the Connecticut Review Board for the National Register approved the Carriage House for study in anticipation of nomination to the National Register. On December 29, 1977, HUD requested from the Department of the Interior a determination of whether the Carriage House was eligible for inclusion in the National Register and on February 7, 1978, the Keeper of the National Register, Department of the Interior, determined the Carriage House was eligible for the National Register.

In December, 1977, attorneys for members of WATCH wrote to HUD's area office in Hartford demanding that National Register eligibility determinations be made with respect to the buildings in the Project Area. On January 18, 1978, HUD's area office informed WURA that additional information had been taken into consideration since the Special Environmental Review of January 28, 1977, and ordered a freeze, i.e., that no Federally assisted acquisition, disposition, renovation, or demolition be conducted on any structure in the Project Area without contact with the area office so that Register eligibility determinations could be made prior to any action being taken. The Advisory Council on Historic Preservation on January 23, 1978, informed the HUD area office that the Advisory Council had become aware of the R-107 Project, and requested that HUD evaluate the significance of the Central Business District and

inform the Advisory Council of HUD's findings. SHPO, in March, 1978, wrote to the HUD area office noting he had received documents from the Agency concerning the buildings in the Project Area, and had made a field trip to the Project Area on February 16, 1978. Based upon these SHPO concluded several portions of the Project Area were eligible for inclusion in the National Register. SHPO noted the area was substantially intact, one of the more complete old downtown areas, and a significant example of the type, and recommended that HUD seek a determination of eligibility for the area.

During the period January, 1978, through September, 1978, HUD was undertaking procedures to determine if properties in the Project Area were eligible for inclusion in the National Register, through the process of viewing the project, consultation with SHPO and relevant agencies, and gathering data. In August, 1978, HUD ordered that the Freeze be lifted. In September, 1978, HUD terminated all activity to seek Register eligibility determinations with respect to properties in the Project Area. On or about September 10, 1978, WURA recommenced demolition in the Project Area. On September 20, 1978, the SHPO sent a mailgram to Richard Fleming, Deputy Assistant Secretary of HUD, confirming that SHPO was not consulted in connection with the catch-up environmental review for the R-107 Project and suggested an immediate review of HUD's decision not to seek a determination of eligibility for the National Register.

WATCH brought this action on October 12, 1978, seeking, *inter alia*, a preliminary injunction. On December 22, 1979, the District Court held that the National Environmental Policy Act ("NEPA") was applicable but that, because the Loan and Capital Grant Contract was executed before any affected properties were listed in the National Register, NHPA was not. The Court also held that subsequent regulations of the Advisory Council on Historic Preservation

could not apply because they would be "inconsistent" with NHPA, the underlying statute. Accordingly, the Court granted WATCH's motion for a preliminary injunction to restrain the defendants from proceeding with the Project.

WURA appealed from the grant of the preliminary injunction. In a cross-appeal and pursuant to certification of the issue under 28 U.S.C. § 1292 (b), WATCH urged that NHPA was applicable to the Project. HUD does not appeal the grant of the injunction.

The parties stipulated that the decision of the District Court would be considered a hearing on the merits. The Second Circuit, on June 25, 1979, affirmed the District Court's issuance of an injunction on NEPA and further decided that NHPA also applies.

Reasons Why the Writ Should Be Denied

I

No true conflict exists between the decision of the Second Circuit in this matter and other Courts of Appeal.

The District Court decided that Section 106 of NHPA, 16 U.S.C. § 470f (hereinafter Section 106) did not apply in this case to require that HUD consult with the Advisory Council. The provision was amended in 1976 to add the words "or eligible for inclusion in," after the words "that is included in." P.L. 94-422, Title II, § 201(3), 90 Stat. 1320. This amendment was enacted while the Project was still ongoing but prior to the Special Environmental Clearance by HUD in January, 1977.

The District Court found that as of the date of the Loan and Capital Grant Contract, May 11, 1973, there were no properties in the Project Area included in the National Register. The date of the execution of the Contract was determined to be the cut-off date for the application of Section 106, and at that time Section 106 did not include the language applying the statute to Register-eligible properties.

The notion of a cut-off date for statute is based upon the view that "approval of the expenditure" in an urban renewal project takes place when the grant-loan contract is executed. Cases supporting this view are: *Kent County Council for Historic Preservation* v. *Romney*, 304 F. Supp. 885; 888 (W.D. Mich. 1969); *St. Joseph Historical Society* v. *Land Clear-ance for Redevelopment Authority*, 366 F. Supp. 605, 609 (W.D. Mo. 1973); *South Hill Neighborhood Association* v. *Romney*, 421 F.2d 454, 462 (6th Cir. 1969), *cert. den.* 397 U.S. 1025 (1970). Indeed, only one case, *Kent County*, is the source of this narrow construction of Section 106. *South Hill* and *St. Joseph Historical Society* reiterate the *Kent County* arguments. Subsequent cases invoking the cut-off principal have relied upon these cases without examination. *Hart* v. *Denver Urban Renewal Authority*, 551 F.2d 1178, 1180 (10th Cir. 1977); *Save the Courthouse* v. *Lynn*, 408 F. Supp. 1323, 1335 (S.D. N.Y. 1975); *Committee to Save the South Green* v. *Hills*, No. H-76-328 (D. Conn. Nov. 5, 1976) 7 ELR 20061, 20064.

Since *Kent County* is the underlying case for the cut-off date principal, the case should be closely examined. There the urban renewal project in question had been certified as completed by the Federal authorities. 304 F. Supp. at 887. The facts show that a decision for the plaintiffs would have resulted in a substantial quantum of damages to third parties. The District Court, in *Kent County*, based its interpretation of Section 106 on "common sense alone", and not on any examination of law, and legislative history, as was done by the Second Circuit in this case. See 304 F. Supp. at 888. In any event the case was decided on procedural grounds. The Court in *Kent County* determined that the plaintiffs' complaint did not in fact raise a reviewable issue of administrative conduct. 304 F. Supp. at 889. Additionally, the Court decided the plaintiffs lacked standing to sue under Section 106. The substantive conclusions of the Court in *Kent County* as to Section 106 are very gratuitous dicta.

South Hill Neighborhood Association v. *Romney*, 421 F.2d 454 (6th Cir. 1969) is not an opinion of the Sixth Circuit. The decision was a per curiam affirmance of a District Court decision. The District Court decision was "attached" to the Court of Appeals decision. The Sixth Circuit decision is no more than this:

> It is here determined that the District Court properly dissolve the Temporary Restraining Order previously entered by it, overruled the plaintiffs' Motion for a Temporary Injunction and sustained the defendants' Motion to Dismiss and dismissed the complaint as amended, and it is further here determined that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and that therefore the motion to affirm is well taken and should be sustained.

The District Court opinion in *South Hill* rests on a finding that the plaintiffs' did not have standing to sue. As with *Kent County*, the Court's treatment of Section 106 is dicta, and not at all well considered or examined.

The Sixth Circuit in *South Hill* did not specifically adopt the District Court opinion as its own. Since the plaintiffs never got beyond the threshold of standing, a consideration of other issues was not necessary. At most the Sixth Circuit decision means that Court of Appeals did not have to address the Section 106 question because, in its view, the District Court, at the time, correctly determined the plaintiffs did not have standing. Surely, if it had been found that plaintiffs had standing, the Sixth Circuit would not have ignored its duty to review the application of a new and significant Federal statute.

Such summary decision should be accorded little or no precedental weight. "Because a summary affirmance is an affirmance of the judgment only, the rationale of the

affirmance may not be gleaned soley from the opinion below." *Mandel* v. *Bradley*, 432 U.S. 173, 176, 53 L. Ed. 2d 199, 204 97 S. Ct. 2238 (1977). The decision of the Sixth Circuit does not meet the recognized standards of *stare decisis*. 20 Am Jur 2d, Courts, § 189. The emerging practice in the Federal system is to accord little weight to summary opinions because they provide a shaky guide to a full dress consideration of the issues at a later time. 1B Moore's Federal Practice § 0.402 [2] (1978-79 Supp. at p. 13-14); Anno., 45 L. Ed. 2d 791, § 5 (1976).

As Petitioner observes, the Tenth Circuit applied a contract cut-off date on the basis that "The use of the contract date as the time at which this provision [Section 106] becomes effective has been established in other jurisdictions." 551 F. 2d at 1180. However, the foregoing analysis of *Kent County* and subsequent cases shows that the contract date-cut-off principal was not established in any jurisdiction by any sound application of principal of *stare decisis*. Consequently, the Second Circuit was judicially unfettered as it approached Section 106.

Section 106 was amended in 1976. The amendment was subsequent to the *Kent County* line of cases. The force and effect of the amendment was material to the construction of Section 106 made by the Second Circuit. 603 F.2d at 324-325. The 1976 amendments also gave the Advisory Council specific power to promulgate regulations. 16 U.S.C. § 470s. The regulations of the Advisory Council encompassed Register eligible buildings and applied to ongoing Federal activity. 36 C.F.R. Part 800. Accordingly, the Second Circuit was dealing with a statutory scheme which had been altered since the *Kent County* line of cases.

There is no real conflict between circuits in this matter. The only possible conflict is between the Second Circuit decision and District Court decision of questionable validity.

II

This petition for certiorari does not raise questions of Federal law so substantial as to require review by the United States Supreme Court.

The principal defendant in this case is the Federal government. This defendant did not pursue this case in the District Court. Attached are memoranda filed by the Federal government in the District Court. On appeal the Federal government filed a brief opposing Petitioner's contentions concerning the National Environmental Policy Act. The Solicitor General has not petitioned for certiorari on behalf of the Federal defendants. Petitioner was joined in this litigation as the partner or agent of the Federal government. *Save the Courthouse Committee* v. *Lynn*, 408 F. Supp. at 1344. Under these circumstances Petitioner cannot be viewed as representing any broad national public interest. Indeed, it is clear from Petitioner's argument under sub (B) on page 5 of the petition, the only claim of concern is with the particular project in Waterbury.

This case involves an urban renewal project. The Housing and Community Development Act of 1974, 42 U.S.C. § 5301 et seq., discontinued urban renewal except to wind up existing projects. Consequently, the issue presented is a non-recurring problem.

A pivotal factor in the case was the continuing authority retained by HUD under the urban renewal Loan and Capital Grant Contract. 603 F.2d at 313. Presumably the Federal government can eliminate continuing responsibility in the future by not retaining continuing authority.

The 1976 amendments to NHPA make clear the act applies to Register eligible properties and gives the Advisory Council clear rule making authority. Certainly, there will be less difficulty and delay in having new Federal programs comply with NHPA then in bringing existing urban renewal projects into compliance.

This issue must be regarded as academic or episodic and not worthy of Supreme Court review.

III.

Granting of the petition for certiorari and decision in favor of Petitioner on the issue raised would not provide Petitioner with any relief.

The injunction granted by the District Court rested solely on the grounds that the government failed to comply with NEPA. This determination was affirmed on appeal and failure to comply with NHPA was added as another basis for the injunction. The parties have stipulated that the District Court hearing should be regarded as a final hearing on the merits. The project is now permanently enjoined until both NEPA and NHPA have been complied with. Petitioner has raised only the NHPA issue.

Rule 23(c) of the Supreme Court Rules provides in relevant part as follows: "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." See also Rule 40(d) (2). A question not presented in the petition for certiorari is not properly before the Court for review. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 431 n.60, 52 L. Ed. 2d 396, 95 S. Ct. 1843 (1977).

NEPA requires that historical and cultural assets be considered in any environmental review. 42 U.S.C. § 4331(b) (4). Compliance with this statute requires virtually the same review as required by Section 106 of NHPA. Indeed, it is intended that both reviews be done on a coordinated basis. See the Advisory Council Regulations, 36 C.F.R. § 800.9. Accordingly, the Petitioner would get no meaningful relief even if this Court reversed the Second Circuit on the question presented. Since the Court of Appeals decision rests on dual and independent grounds, and Petitioner has raised only one of them, the petition ought be dismissed. *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 465 n.5, 8 L. Ed. 2d 39, 83 S. Ct. 913 (1962).

CONCLUSION

For these reasons this case is not a proper one for review by certiorari in the Supreme Court of the United States, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM HOWARD

Shaw and Howard
83 Crescent Street
Middletown, Connecticut
Counsel for the Respondent
WATCH

Dated: Middletown, Connecticut
November 6, 1979

ADDENDUM

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

WATCH (Waterbury Action to:
Conserve Our Heritage, Inc.), :
Plaintiff, :

v. CIVIL NO. H-78-539

PATRICIA ROBERTS
HARRIS, :
ET. ALS.,

Defendants. :

FEDERAL DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff's Complaint alleges that defendants have failed to comply with the National Environmental Policy Act of 1969 ("NEPA"), the National Historic Preservation Act of 1966 ("NHPA"), Executive Order 11593, and regulations and guidelines promulgated pursuant thereto as they pertain to an urban renewal project in Waterbury, Connecticut (Project No. Conn. R-107). Plaintiff seeks to enjoin defendants from proceeding with the project until such time as compliance with the aforesaid statutory and regulatory provisions is achieved.

In ruling on preliminary injunction and dismissal motions in *Committee to Save the South Green* v. *Hills*, Civil No. H-76-328 (D. Conn. Nov. 5, 1976) (Blumenfeld, *J.*), the District Court held that since HUD had adopted by reference the regulations promulgated by the Advisory Council on

Historic Preservation to implement the NHPA, HUD was bound by the standards specified in those regulations. *See*, HUD Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality, (38 Fed. Reg. 19182 at 19185, July 18, 1973); 36 C.F.R. 800. The Loan and Capital Grant Contract for Conn. R-107 was executed by HUD and the Waterbury Urban Renewal Agency in 1973. However, the NEPA environmental review for this project was not performed until several years later; the special environmental clearance was issued by HUD on January 28, 1977.

The Advisory Council regulations in effect when the Loan and Grant Contract was executed in 1973, *see* 38 Fed. Reg. 5388 *et. seq.*, required only that consideration be given to the effect of federally financed activities upon properties listed on the National Register of Historic Places. These regulations were subsequently amended to additionally require identification of properties eligible for inclusion in the National Register and consideration of the effect of federally financed activities upon such properties. The amended Advisory Council regulations were in effect at the time the environmental review of this project was performed. It is HUD policy that the governing regulations are the applicable regulations in effect at the time that the NEPA environmental review is conducted. In performing the special environmental clearance for Conn. R-107, HUD did not take appropriate steps to identify properties eligible for inclusion on the National Register of Historic Places.

Since the District Court has held that HUD is bound by its regulations, which adopt by reference the Advisory Council procedures, HUD cannot respond further on the issues raised in this case. However, the Waterbury Urban Renewal Agency, the co-defendant responsible for undertaking and completing the project involved in this litigation, is the party most directly affected by any decision rendered;

the Agency, therefore, should be afforded a full opportunity to present all legal and equitable arguments available to it.

Respectfully submitted,
RICHARD BLUMENTHAL
United States Attorney

BY: S/ Diana Garfield
DIANA GARFIELD
Assistant United States Attorney

OF COUNSEL:
Kathy Machan
Regional Counsel's Office
Dept. of Housing & Urban Development
John F. Kennedy Federal Building
Boston, Massachusetts 02203

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WATCH (Waterbury Action to: Conserve Our Heritage, Inc.), :
Plaintiff, :

v. CIVIL NO. H-78-539

PATRICIA ROBERTS HARRIS, ET. ALS., :

Defendants. :

FEDERAL DEFENDANT'S
POST-HEARING MEMORANDUM

On July 18, 1973, the Department of Housing and Urban Development ("HUD") published in the Federal Register its Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality ("Handbook"), 38 Fed. Reg. 19182 *et. seq.* Section 5(a) (6) of that Handbook provides, in pertinent part:

> Any HUD action or undertaking which has an effect on a property listed on, or nominated to, the National Register of Historic Places will require Special Environmental Clearance and must comply with section 106 of the National Historic Preservation Act of 1966 and implementing procedures.

In 1973, when the Handbook was published, both section 106 of the NHPA, 16 U.S.C. §470(f), and the Advisory Council's implementing procedures, 36 C.F.R. §800.4, required consideration of a project's effect on properties included in the National Register. The HUD Handbook, therefore, was consonant with existing statutory and regulatory provisions.

In 1974, the Advisory Council's implementing procedures were amended to additionally require such consideration for properties eligible for inclusion in the National Register. In 1976, section 106 was broadened to conform to the implementing regulations by also requiring consideration of a project's effect on properties eligible for inclusion in the National Register. The HUD Handbook, although amended on June 11, 1976, 41 Fed. Reg. 23878, did not change section 5(a) (6). HUD has, however, considered its responsibilities to include the tri-partite consideration of a project's effect on properties listed on, nominated to, or eligible for inclusion in the National Register under an obligation emanating from the mandates of section 106 itself, from HUD's adoption of the Part 800 regulations, *see, Committee to Save The South Green* v. *Hills*, Civil No. H-76-328 (D.Conn. Nov. 5, 1976), as well as from an interpretation of the Handbook which incorporates statutory and regulatory changes. It is HUD policy that the governing requirements stem from the applicable statute and regulations in effect at the time the environmental review is conducted; in the instant case, the special environmental clearance was issued by HUD on January 28, 1977, which is subsequent to the amendment of the statute and regulations. At the hearing on plaintiff's motion for a preliminary injunction, the testimony of Philip Forzley, HUD's Environmental Clearance Officer, revealed that HUD did not take appropriate steps to identify properties eligible for inclusion in the National Register.

Respectfully submitted,

RICHARD BLUMENTHAL
United States Attorney

BY: S/ Diana Garfield

DIANA GARFIELD
Assistant United States Attorney